RECORD AND BRIEFS

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DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

STATE OF HAWAII, ET AL.,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF *AMICI CURIAE* PROFESSORS OF FEDERAL COURTS JURISPRUDENCE, CONSTITUTIONAL LAW, AND IMMIGRATION LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are academics whose expertise includes the jurisprudence of federal courts, constitutional law, and/or immigration law. *Amici* submit this brief to explain why, given constitutional commitments to separation of powers, the President lacked authority to issue the directive set forth in section 2(c) of Executive Order No. 13780 (the "Executive Order") denying entry to the United States to individuals from a list of predominantly Muslim countries based solely on nationality.

SUMMARY OF ARGUMENT

The Executive Order categorically suspends the entry of all nationals from a list of predominantly Muslim countries on the premise that all such nationals present heightened risks of terrorism, rendering their entry into the United States a threat to national security. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) is central to evaluating the validity of this executive action and whether it complies with established separation-of-power principles. The framework described in *Youngstown*, and its subsequent application in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), requires this Court to analyze what Congress has authorized, what it has

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[1] The parties have consented to the filing of this brief. Counsel affirms, in compliance with Supreme Court Rule 37.6, that no party, or counsel for a party, has played a role in the drafting or preparation of this brief; nor did any person other than amici provide financial support in connection with the preparation and filing of this brief. A list of *amici* may be found at Appendix A.

prohibited, and the "general tenor" of congressional immigration legislation. As we argue below, the President does not have independent and exclusive authority over immigration, and the Executive Order is not authorized by statute and contravenes express and implied congressional mandates.

Contrary to the President's assertion, the Immigration and Nationality Act ("INA") does not delegate to the executive plenary authority to act invidiously by invoking nationality as the sole basis for excluding millions of people from the United States. Reading section 212(f), codified at 8 U.S.C. § 1182(f) (hereinafter section 1182(f)), as authorizing such unfettered discretion is at odds with its historical interpretation and usage and cannot be reconciled with its meaning in the broader statutory context within which it operates. Moreover, the President's broad reading of section 1182(f) would raise concerns that Congress has abdicated its own constitutional role in setting immigration policy.

Section 1182(f) must be read in the context of the INA as a whole. In 1965, Congress, deeply troubled by the historic abuse of nationality as a stalking horse for racial, ethnic, and religious intolerance, banned its use in the issuance of immigrant visas. *See* 8 U.S.C. § 1152(a). And in the half century since, Congress has repeatedly insisted on the use of specific nondiscriminatory criteria when excluding entrants to the United States on the basis that individuals are purported threats to safety and security.

The Executive Order employs nationality as a stand-in for an individual's religion and propensity to engage in terrorism or to undermine Americans' safety. In so doing, the President unilaterally resurrects the use of nationality as the sole basis to ban entry into the United States and acts in contravention of sustained congressional opposition to the use of such historically-discredited tests for entry. Under these circumstances, the President's power is at or near its "lowest ebb" and is valid only if the President possesses independent and exclusive constitutional powers that preclude Congress "from acting upon the subject." *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring). Because no such constitutional power of the president over immigration exists, the Executive Order cannot be sustained.

ARGUMENT

Throughout its history, this Court has played a foundational role in protecting the rule of law by delineating and enforcing constitutional limits on the authority of the other branches of our national government. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding unconstitutional an executive order that "legislated" the seizure of the nation's steel mills). *See also Marbury v. Madison*, 1 Cranch 137 (1803) (holding that courts possess power to review the legality of actions by even the highest officers of the government and concluding that Congress exceeded constitutional limits in attempting to expand Article III jurisdiction).

When executive action is challenged, the Court does not stay its hand because the President argues his prerogatives in the areas of national security, foreign affairs, citizenship, or immigration. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that, notwithstanding the president's Commander-in-Chief powers and an existing exigency, executive lacked authority to convene the military commission at issue). *See also Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (evaluating whether executive action was consistent with the "general tenor" of congressional legislation). As this Court has explained, "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

In this case, the Court is called on once again to scrutinize the President's claimed basis for authorization, viewed as it must be in the context of Congress's other more specific actions dealing with the same general subject. As explained below, the President's attempt to use nationality as a proxy for the individualized characteristic of "heightened risk[] to ... security", Exec. Order 13780,—and to bar entry to millions of individuals on that basis alone—not only lacks specific statutory authorization, but contravenes both express and implicit congressional directives.

I. THE GOVERNING LEGAL FRAMEWORK

"The President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585.

Youngstown provides the framework for assessing the validity of the Executive Order in this case. *See Hamdan*, 548 U.S. at 638 (Kennedy, J. concurring ("The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown*."). As Justice Black's opinion for the Court explained, the question of the President's power to seize control of the private companies turned on the Constitution or laws, and it had to be analyzed initially in light of relevant legislation. *Youngstown*, 343 U.S. at 585–86.

In *Youngstown*, this Court invalidated an executive order directing a temporary government seizure of the nation's steel mills to avoid a steel workers' strike that could have halted steel production during the Korean War.[2] Despite the threat to the lives of American service members if steel production ceased, the Court held that the President had acted without appropriate congressional authority and struck down the seizure order as an unconstitutional exercise of unilateral presidential power. The Court concluded that the order was "not only unauthorized by any congressional enactment," but also effectively legislated policy that Congress had specifically

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[2] As the dissent explained, the United States furnished "vigorous support" in response to the United Nations's call for assistance "to repel aggression in Korea." *Youngstown*, 343 U.S. at 668 (Vinson, C.J., dissenting). At the time *Youngstown* was decided, American armed forces had been fighting in Korea for "almost two full years . . . suffering casualties of over 108,000 men," and hostilities had not abated. *Id.*

rejected. *Id.* at 586.[3] The Court further held that the President's constitutionally derived power, including his power as Commander-in-Chief, could not authorize the seizure order. *Id.* at 587. At bottom, the Court deemed the power "to take possession of private property to keep labor disputes from stopping production ... [to be] a job for the Nation's lawmakers, not for its military authorities." *Id.*

In his concurrence, Justice Jackson set forth what has become an important tripartite framework applied to evaluate the legality of presidential action. Under this admittedly "somewhat over-simplified grouping," an exercise of presidential power typically falls within one of three categories:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. [hereinafter "Category 1"]
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is

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[3] Five years prior, Congress had considered—and rejected—enacting a law that would have authorized such governmental seizures in cases of emergency. *Youngstown*, 343 U.S. at 586.

> uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. [hereinafter "Category 2"]
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers . . . . Courts can sustain exclusive Presidential control in such as case only by disabling the Congress from acting upon the subject. [hereinafter "Category 3"]

Id. at 635-38 (Jackson, J., concurring).

Justice Jackson concluded that the President's seizure order fell in Category 3 because no statute explicitly authorized the executive seizure of the steel industry, and Congress had enacted detailed procedures for the seizure of property that were inconsistent with the President's order. *Id.* at 639. Accordingly, the order could be sustained only if the seizure was "within [the President's] domain and beyond control by Congress." *Id.* at 640. Justice Jackson rejected each of the President's asserted bases for such "conclusive and preclusive" constitutional authority, *id.* at 638, including the executive power, the President's powers as commander in chief, and any "nebulous, inherent

powers" to act regardless of congressional decisions. *Id.* at 640-46.

Thirty years later, in *Dames & Moore*, this Court returned to the *Youngstown* categories and explained both their application and how they might overlap. In evaluating the legality of three executive orders implementing an agreement to secure the release of U.S. citizens held hostage in Iran, the Court recognized that "executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Dames & Moore*, 453 U.S. at 669.

This Court held that the first two executive orders—which (1) nullified certain Article III prejudgment attachments on Iranian assets and (2) directed that those assets be transferred to federal authorities for ultimate return to Iran—were specifically authorized by the International Emergency Economic Powers Act ("IEEPA") and thus fell within *Youngstown*'s Category 1. *Id.* at 670–74. With respect to the third order, suspending pending claims, however, the Court ruled that neither the IEEPA nor the so-called Hostage Act of 1868 provided statutory authority for this executive action. "Although the broad language of the Hostage Act suggests it may [have] cover[ed] this case," the Court recognized that legislative history suggested the Act was passed in response to a non-analogous situation, and it was therefore "somewhat ambiguous" as to whether Congress contemplated the precise presidential action at issue. *Id.* at 675–77.

Given this ambiguity, the Court looked to two factors, (a) the "general tenor of Congress's legislation in this area" and (b) the long and unbroken history of claims settlement through Executive Agreement. *Id.* at 678–80. The Court concluded that Congress had acquiesced in the President's exercise of authority to settle claims against foreign powers. *Id.* The Court emphasized, however, the "narrowness" of its decision, *id.* at 688, and indicated that, as this Court has recently explained, its approach was not intended to "be construed as license of the broad exercise of unilateral executive power." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 & n. 28 (2017).

Applying *Youngstown* and *Dames & Moore* here, *amici* have evaluated whether § 1182(f)'s facially broad language specifically authorizes the Executive Order. *Amici* conclude that language, particularly when read in light of subsequent legislation and executive action, does not sustain the Executive Order. In light of the interpretive history of this provision, it is, at a minimum, ambiguous whether Congress intended to afford the President such broad discretion. Moreover, neither of the factors licensing presidential authority in *Dames & Moore* is present in this case. Indeed, other "legislation in this area," *Dames & Moore*, 453 U.S. at 678, demonstrates Congress's affirmative *opposition* to the use of nationality in determining eligibility for entry (beyond specific visa allocation authorization) and, more generally, its opposition to substituting categorical proxies for "dangerousness" in place of an individualized assessment. Because the President lacks any "conclusive and preclusive" constitutional

power to override this contrary congressional intent, *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring), the Executive Order was not authorized.

II. SECTION 1182(F) DOES NOT GRANT THE PRESIDENT UNFETTERED DISCRETION TO EXCLUDE NONCITIZENS

As *Youngstown* and *Dames & Moore* illustrate, a careful analysis of specific statutes is essential to evaluating the lawfulness of executive action. The President asserts that 8 U.S.C. § 1182(f) provides authorization for the Executive Order. Section 1182(f) provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).[4]

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[4] The Executive Order cites a second provision to support its claim of statutory authorization, section 215(a)(1) of the Immigration and Nationality Act, which provides: "Unless otherwise ordered by the President, it shall be unlawful ... for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, (footnote continued)

Although the President claims that this language delegates unfettered discretion to the Executive to suspend entry for whole classes of aliens based on any criteria whatsoever, canons of statutory construction as well as the statute's interpretive history counsel against such an expansive reading. The House Report recommending the bill that would enact § 1182(f) began with a lengthy affirmance of the power of *Congress* to control immigration, *see* H.R. Rep. 82-1365 at 5–6, a principle derived directly from the Constitution, which vests Congress with authority to "establish an uniform Rule of Naturalization" and to regulate or prohibit the "Migration" of persons. U.S. Const., art. I, s. 8,9.[5] The sorry history of the Migration clause, aimed to protect the slave trade, does not preclude its use to show the relevant constitutional framework—that after the twenty year hiatus stipulated, it is for Congress to decide on the "Migration ... of ... Persons."[6]

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regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. 1185(a)(1) (hereinafter section 1185(a)(1)). This provision does not add to the President's substantive authority.

[5] Article I, Section 9, prohibits Congress, for a period of twenty years, from prohibiting "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit."

[6] This Court has identified other sources for Congress's power to regulate immigration, including the Commerce Clause, war powers and powers inherent in sovereignty. *See generally, e.g., Chae Chan Ping v. United States,* 130 U.S. 581 (1889); *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952).

Given congressional power, the question becomes understanding what Congress has delegated and this case is one of many in which a potentially broad authorization from Congress has to be read by this Court to reflect basic principles of separation of powers and to avoid constitutional questions about the limits of delegation.[7] In *Hamdan,* 548 U.S. 557, this Court concluded that the Joint Resolution for the Authorization for Use of Military Force (AUMF), enacted by Congress immediately after the September 11 terrorist attacks, while capacious, did not authorize the use of military commissions to try suspected terrorists. The AUMF delegates to the President power to "'use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks ... in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.'" *Id.* at 568 (quoting AUMF, 115 Stat. 224). The President invoked this authority to issue an Executive Order providing for trial by military commission for any individual

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[7] In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312 (1936), the Court rejected a non-delegation challenge to a far more narrowly circumscribed statute. Congress had passed a Joint Resolution authorizing the President to prohibit "the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco," to wit, fighting between Paraguay and Bolivia, upon making certain findings. In concluding that presidential power was at its zenith in this case, the Court was addressing a factual circumstance in which the President was acting pursuant to a very specific, and limited, authorization by Congress.

suspected of membership in al Qaeda or participation in terrorist acts against the United States. *Id.* at 568. The Court concluded that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter Article 21 of the" Uniform Code of Military Justice. *Id.* at 594. Even in the context of a direct response to domestic terrorist attacks, the Court did not approve the excessive claim by the Executive of unfettered authority to convene military commissions to try noncitizens.

Similarly, *Jean v. Nelson*, 472 U.S. 846 (1985), shows that a broad statutory delegation of immigration discretion to the executive should not be read as conferring limitless power to engage in discrimination. There, the Eleventh Circuit had concluded that in enacting a statute granting the Executive discretion to "parole into the United States any ... alien applying for admission 'under such conditions as he may prescribe,'" Congress delegated to the Executive the authority to make parole decisions on the basis of race or national origin, and that such a delegation was consistent with the Constitution. *Id.* at 848, 852 (quoting 8 U.S.C. § 1182(d)(5)(A)). This Court declined to endorse this view. The Court found it unnecessary to reach the constitutional issues in light of its conclusion that the statutes and regulations prohibited such discrimination. *Id.* at 854–56, *cf. id.* at 862–63 (Marshall, J., dissenting) (noting absence of language in statute expressly prohibiting nationality-based distinctions).

Even in *Dames & Moore*, which concluded that the President did have the constitutional authority to suspend pending judicial claims against Iran, the Court was unwilling to read a broadly worded statute, outside of the context of other relevant statutes and past practices, to authorize presidential action. After deciding that the International Emergency Economic Powers Act (IEEPA) did not authorize the President's actions, the Court further analyzed the much older Hostage Act of 1868, which provided that whenever a U.S. citizen was unjustly held by a foreign government, the President was to demand the citizen's release "and if the release so demanded is unreasonably delayed or refused, *the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release.*" 22 U.S.C. § 1732 (emphasis added). *See also Dames & Moore*, 453 U.S. at 676. While recognizing this "broad language," the Court nonetheless declined to construe it as authorizing the President's suspension of pending claims. *Id.* at 676-77. The Court noted that the issue prompting the 1868 legislation did not involve foreign powers interested in trading hostages back, but rather foreign powers seeking to repatriate American citizens. *Id.* The Court then turned to the legislative history, which it found "somewhat ambiguous" on whether the statute contemplated actions such as those taken by the President. *Id.* at 677. But the Court found that Congress *had* enacted specific procedures to implement Executive Agreements of this kind and, from that, concluded that Congress had "placed its stamp of approval" on such actions. *Id.* at 680.

The Executive Order here benefits from no such "stamp of approval." Unlike in *Dames & Moore*, there is no evidence that Congress assumed, much less endorsed, unlimited executive power to exclude noncitizens on the basis of nationality alone. No President has ever issued an order akin to what is before this Court now—eliminating any possible inference that Congress has "acquiesced" to such a practice. Rather, past presidential exercises of the authority to bar noncitizens' entry suggest an understanding of meaningful limits to this power. A recent Congressional Research Service Report identified 43 instances between 1981 and 2017 where the president invoked § 1182(f) to suspend the entry of noncitizens. *See* Kate Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens: In Brief* (Jan. 23, 2017). In one additional instance of which amici are aware, the President relied on section 1185(a)(1) rather than section 1182(f) to justify the suspension of a class of aliens.[8]

On no occasion has a President used nationality alone to impute individualized characteristics for the purpose of barring noncitizens' entry into the United States. In the vast majority of instances, the executive barred noncitizens who on an individual basis demonstrated engagement in a particular course of conduct. *See, e.g.*, Exec. Order No. 13694, 80 Fed. Reg. 18077 (Apr. 2, 2015) (suspending the entry of aliens who have engaged in significant

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[8] As discussed immediately below, President Carter relied on section 1185(a) to "prescribe limitations and exceptions" on the entry of Iranians.

"malicious cyber-enabled activities"); Proclamation No. 8697, 76 Fed. Reg. 49277 (Aug. 9, 2011) (suspending entry of individuals who participate in serious human rights violations); Proclamation No. 4865, 46 Fed. Reg. 48017 (Oct. 1, 1981) (suspending entry of noncitizens who approach the United States by sea without documentation).

A number of instances target individuals from particular nations based on specific conduct or affiliations. *See* Exec. Order No. 13687, 80 Fed. Reg. 819 (Jan. 6, 2015) (suspending officials of the North Korean government or the Workers' Party of Korea); Proclamation No. 7524, 67 Fed. Reg. 8857 (Feb. 26, 2002) (suspending entry of individuals who threaten Zimbabwe's democratic institutions); Proclamation No. 7249, 64 Fed. Reg. 62561 (Nov. 19, 1999) (suspending entry for individuals responsible for repression of civilian population in Kosovo); Proclamation No. 5377, 50 Fed. Reg. 41329 (Oct. 10, 1985) (suspending the entry of nonimmigrant officers or employees of the Government of Cuba or the Communist Party of Cuba).

In only two instances has the President suspended entry without regard to individualized conduct, and both were part of specific conflicts with a particular country. In response to the Government of Cuba's decision to suspend execution of then-governing immigration agreements between the U.S. and Cuba, President Reagan, in August 1986, suspended the entry of Cuban nationals under certain types of immigrant visas. Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 26, 1986). President Carter invoked section 1185(a)(1) to "prescribe

limitations and exceptions on the rules and regulations governing entry of aliens into the United States" for Iranians. Exec. Order No. 12172, 44 Fed. Reg. 67947 (Nov. 26, 1979); Exec. Order 12206, 45 Fed. Reg. 24101 (Apr. 7, 1980) (modifying Exec. Order No. 12172). These orders were a specific response to actions taken by a foreign government.[9] In neither of these instances did the Executive's actions impute individualized characteristics on the basis of nationality. Nationality was not used as a surrogate for dangerousness, but as a means of sanctioning a country for its behavior towards the United States. The exclusion of Cubans in the 1980s and of Iranians during the Iranian hostage crisis was not based on presumptions of, for example, criminality. Instead, these exclusions were deployed as diplomatic tools to target the *governments* of those nations,[10] in resolving intergovernmental foreign

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[9] The ban on entry of Iranian nationals was a direct response to the Iran hostage crisis. *See* Jimmy Carter, "Sanctions Against Iran Remarks Announcing U.S. Actions.", April 7, 1980. The ban on entry of Cubans was a direct response to Cuba's decision to "suspend all types of procedures regarding the execution" of the immigration agreement between Cuba and the United States. It applied only to immigrant entrants, and only to those who did not enter as "immediate relatives under Section 201(b)" or "as preference immigrant under Section 203(a)." Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 26, 1986).

[10] The President has, through executive orders, identified specific nationalities in another context—to determine the level of scrutiny to be applied to visa applicants, including to relax the review prior to entry. Those actions are explicitly authorized by Congress, which has created the visa waiver program to authorize the Secretary of Homeland Security, in consultation with the Secretary of State, to designate the nationals of particular countries as eligible for entry for

(footnote continued)

policy crises within the realm of presidential power that had not been cabined by Congress.

The present case is the inverse of Dames & Moore. There, the President sought to exert his authority in an area in which the Executive had long exercised such powers and Congress had repeatedly acquiesced to that application of those Executive powers. Here, by contrast, the President seeks to exert far broader authority than any president before him; he demands, in essence, the type of "license for the broad exercise of unilateral executive power," which Dames forbade. *Bank Markazi*, 136 S. Ct. at 1328 & n.28.

Nor does the "general tenor" of congressional legislation in the immigration arena suggest congressional approval of the President's actions. *See Dames & Moore*, 453 U.S. at 678-79. Congress has enacted a complex statutory scheme that suggests just the opposite: Contrary to the Executive Order, denials of entry must be based on evaluations of dangerousness rather than the blanket assumption that individuals from certain countries are *per se* dangerous. *See, e.g.*, Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, § 302 (1996); USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, § 411 (2001); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, § 103 (2005). As this Court said in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, "[i]t is a

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business or tourism without first securing visas at U.S. consular offices. *See* 8 U.S.C. § 1187.

'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" 529 U.S. 120, 132 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).[11] It is to these other provisions of the INA to which *amici* now turn in more detail.

III. THE GENERAL TENOR OF IMMIGRATION LEGISLATION IS CONTRARY TO THE EXECUTIVE ORDER

A review of the history of immigration law is required to understand how the "general tenor" of congressional legislation changed during the last century. By the time of the 1952 enactment of section 1182(f), Congress had already begun to eschew the use of nationality as a proxy for racial, ethnic, and religious intolerance in entry determinations. And legislation enacted after 1952 evinces Congress's repudiation of the use of nationality as the sole basis to exclude persons based on generalized fears of terrorism.[12] Thereafter, Congress in 1965 enacted an

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[11] Given that section 1182(f), as properly construed, does not allow unfettered executive discretion to engage in invidious nationality-based discrimination, *see* § II, *supra*, the Court need not reach the issue of whether the President's sweeping view of section 1182(f) would raise the question of whether Congress's delegation to the Executive is invalid. *See, e.g., Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.").

[12] Given "the institutional and other barriers to the passage of legislation," affirmative acts by Congress rejecting a particular course of presidential conduct "should be given very heavy interpretive weight." Curtis A. Bradley & Trevor W. Morrison, (footnote continued)

explicit ban on the use of nationality to discriminate against persons seeking immigrant visas. And in other legislation, Congress has repeatedly demonstrated a commitment to relying on individualized assessments—rather than discredited stereotypes—to determine admissibility.

A. Congress Historically Used Nationality Categorically To Exclude Noncitizens

No student of United States history can ignore that our Nation's immigration policies once routinely relied on notions of racial and cultural inferiority and religious prejudice to exclude certain nationalities as threats to our safety and stability. It was not until the mid-twentieth century that Congress, recognizing the frequency with which nationality and national origin had historically been employed as the basis for invidious discrimination based on race, religion, and ethnicity, prohibited the use of such classifications.

A brief recap of this history is helpful to deciding the constitutionality of the Executive Order. Beginning after the Civil War, Congress relied expressly on nationality to restrict the entry of noncitizens perceived as threats to national security and national identity.[13] Congress enacted a series of

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Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 449 (2012).

[13] Prior to the Civil War, states regulated the entry of noncitizens, as part of their regulation of people from other states. See generally Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875), 93 Colum. L. Rev. 1833, 1885 (1993).

laws targeting and ultimately prohibiting virtually all Chinese immigration. *See, e.g.*, Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882); Scott Act of 1888, ch. 1064, 25 Stat. 504 (1888); Geary Act of 1892, ch. 60, 27 Stat. 25 (1892); Act of April 27, 1904, ch. 1630, 33 Stat. 428 (1904).[14] In 1917, Congress created the "Asiatic Barred Zone," excluding noncitizens from a vast swathe of the globe stretching from Saudi Arabia to the Polynesian islands. *See* Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874 (1917). In 1924, Congress imposed an even broader prohibition on immigration of noncitizens who were not "free white persons," "aliens of African nativity, . . . [or] persons of African descent." *See* Immigration Act of 1924, Ch. 190, § 13, 43 Stat. 153, 161–62 (1924); H. R. Rep. 68-350 at 6 (1924) (internal quotation marks omitted).

Noncitizens who were not categorically excluded on these racial grounds remained subject to strict national-origin quotas, a system designed to favor immigrants from northern and western Europe. *Id.* These restrictions were commonly understood to be aimed "principally at two peoples, the Italians and the Jews." 70 Cong. Rec. 3526 (1929). During this time, national origin served as a proxy for undesirable groups perceived to "reproduce more rapidly on a lower standard of living" and "unduly charge our institutions for the care of the socially

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[14] Proponents of these measures frequently invoked national security rationales, characterizing the Chinese as "a standing menace to the social and political institutions of the country." H. R. Rep. 45-62, 3 (1879).

inadequate." H. R. Rep. 68-350, 13-14. The goal was to "preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best we can at this late date, racial homogeneity in the United States." *Id.* at 16. These measures were described as necessary to national survival: "If therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained." *Id.* at 13.[15]

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[15] To be sure, passage of the 1924 Act was not without objection. The minority report in the House noted, "The obvious purpose of [favoring northern and western Europeans over southern and eastern Europeans], however much it may now be disavowed, is the adoption of an unfounded anthropological theory that the nations which are favored are the progeny of fictitious and hitherto unsuspected Nordic ancestors, while those discriminated against are not classified as belonging to that mythical ancestral stock." H. R. Rep. No. 68-350, pt. 2, at 4. These members of Congress characterized the bill as "casting the apple of discord into our national life, and without the slightest reason is attempting to create a new classification of our population and to declare, in the form of legislation, that American citizens are to be divided into superior and inferior types, depending upon the land which gave birth to them or to their ancestors." *Id.* at 14.

B. In 1965, Congress Expressly Prohibited the Use of Nationality in the Issuance of Immigrant Visas

In 1965, Congress enacted the Hart-Celler Act, amending the Immigration and Nationality Act. The 1965 Act eliminated the national-origins quota system that had been used to exclude nationalities deemed to be undesirable. The Act did use nationality to further equal access to immigration visas through numerical allocations but it otherwise expressly ruled out the use of nationality—as well as race, sex, place of birth, and place of residence—in the issuance of long-term immigrant visas. Pub. L. 89-236, 79 Stat. 911, sec. 2 (1965).

An overarching goal of the 1965 Act was to ensure that exclusions would be based on individualized determinations, rather than on the basis of blanket stereotypes about race and country of origin. Aside from a few exceptions, Section 1152(a) provides, in relevant part: "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a).[16]

This text was explained by Senator Philip Hart, one of the chief sponsors of the bill: "No matter how you slice it, it is impossible to defend and it is

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[16] The Hart-Celler Act abandoned the national-origin quota systems and instead imposed a uniform per-country limit of 20,000 for all countries outside of the western hemisphere. *See* Pub. L. No. 89-236, sec. 202, § 2(a), 79 Stat. 911–912 (1965).

offensive to anyone with a sense of the right of an individual to be judged as a good or a bad person, not from which side of the tracks he comes. This just does not make sense and should offend those of us here at home as much as we know it offends peoples all around the world." Hearings on S. 500 Before the Subcomm. on Immigration & Naturalization, 89 Cong. 4 (1965). President Johnson described the national origin quotas as "incompatible with our basic American tradition.... The fundamental, longtime American attitude has been to ask not where a person comes from but what are his personal qualities." *See* 111 Cong. Rec. 686 (Jan. 15, 1965). Thereafter, when he signed the bill, the President made plain its commitments: "This bill says simply that from this day forth those wishing to immigrate to America shall be admitted on the basis of their skills and their close relationship with those already here." Lyndon B. Johnson, Remarks At The Signing Of The Immigration Bill (Oct. 3, 1965).

The text prohibits using nationality as a basis for denying entry to long-term immigrants. The scope is likewise of central importance. Unlike other provisions of the INA, section 1152(a) acts to restrain the entire executive branch, including the President. *Cf. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 172 (1993) (concluding that constraints on executive discretion imposed by § 243(h) of the INA apply to the Attorney General but not the President). Further, Congress authorized, in section 1152(a), an enumerated set of exceptions relating to uniform per-country cap on immigrant visas; the President's exercise of section 1182(f) power is not listed as one of those exceptions.

C. Congress Has Repeatedly Required That Entry Decisions Be Based On Assessment Of Noninvidious Criteria

In addition to the express language of section 1152(a) prohibiting discrimination against noncitizens seeking entry as permanent residents, the historical arc of our nation's immigration laws and the overall structure of the INA demonstrate congressional intent to preclude the use of invidious stereotypes for nonimmigrant temporary entrants as well.

Beginning in the 1940s with the repeal of the Chinese Exclusion Acts, Congress has eliminated various nationality-based bars to entry in favor of individualized assessments for undesirable traits. As explained above, the 1965 Act was enacted in furtherance of the fundamental American belief that persons ought to be judged based on their individual qualities.

Since the passage of the 1965 Act, Congress has required that the immigration processes of our government focused on individualized criteria to determine whether a given noncitizen—whether an immigrant or a non-immigrant—should be excluded as a national security risk. *See, e.g.*, Anti-Terrorism and Effective Death Penalty Act § 411 (expanding grounds for excluding noncitizens affiliated with terrorist organizations); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 § 342; USA PATRIOT Act § 411 (2001) (expanding definition of terrorist activity for purposes of exclusion; REAL ID Act § 103

(same). Thus, individuals may be excluded because, for example, they are "a member of a terrorist organization ... unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization" or because they are "the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years" unless the child or spouse did not know of the terrorist activity, or has renounced such activity. 8 U.S.C. § 1182(3)(B).

Similarly, in legislation dealing with non-terrorism related immigration issues, Congress has eschewed the use of nationality as a basis for exclusion. *See generally* IIRIRA § 346. On the few occasions where Congress employed nationality classifications, it did so to *grant relief* based on particular country conditions—either to permit special opportunities to enter the United States or to avoid deportation—and did so *without* imputing invidious or stigmatizing traits. *See, e.g.*, Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. 105-100, 111 Stat. 2160; Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, 112 Stat. 2681.

The historical evolution of our nation's immigration laws, the 1965 statutory ban on the use of nationality in issuing immigrant visas except to further equal access to immigrant visas, and Congress's post-1965 enactments focusing on individualized assessments to determine inadmissibility all demonstrate that the "general

tenor of Congress's legislation in this area" is a repudiation of the blanket use of "nationality" to impute traits of dangerousness or criminality for the purpose of imposing a categorical bar to entry. *Dames & Moore*, 453 U.S. at 678. The President is, therefore, "acting alone," without "the acceptance of Congress." *Id.*

This conclusion is consistent with this Court's approach to statutory interpretation. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . . ." *Id.* at 550–51; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

Here, Section 1152(a) was enacted after section § 1182(f) and addresses the specific issue of non-discrimination in the issuance of immigrant visas. Given that the President is precluded from discriminating against persons in the issuance of immigrant visas based on nationality, section 1182(f) should not be read to permit him to enact a wholesale denial of entry to persons based on this same classification—a subset of which would include persons seeking immigrant visas. *See, e.g. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

Moreover, the two sections are reconcilable: the President's exercise of § 1182(f) power—suspending entry of a class of aliens deemed to be "detrimental to the interests of the United States,"—is limited by § 1152(a). Namely, the President may not, in the absence of intergovernmental conflict with foreign countries, broadly suspend the entry of aliens as threats based solely on their nationality and in a manner that carries invidious implications of criminal, terrorist or dangerous tendencies on the part of all persons of that nationality. In short, the Executive's use of nationality as a proxy for dangerousness and as the sole criterion to suspend entry into the United States is not only contrary to the "general tenor" of congressional legislation, it cannot be reconciled with section 1152(a) and subsequent immigration laws that demonstrate congressional intent to move the United States away from reliance on nationality as a categorical basis for exclusion on national security grounds.[17]

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[17] Amici do not suggest that nationality classifications are never permitted in the immigration context. Congress has not precluded the President from using nationality as a factor to determine the level of scrutiny for individuals of identified countries, or to respond to special disaster needs, diplomatic interactions, or the hostile acts of foreign governments to the United States. In such instances, there is no imputation of invidious, discriminatory purpose based on nationality, of the kind that can redound to the detriment of U.S. citizens and others within the U.S of the same heritage. In 1965, when the Hart-Celler Act became law, President Johnson said: "We can now believe that [the prior system] will never again shadow the gate to the American Nation with the twin barriers of prejudice and privilege. .. [T]hose who do come here will come because of what they are , and not because of the land from which they

(footnote continued)

IV. THE EXECUTIVE ORDER IS NOT AUTHORIZED UNDER THE YOUNGSTOWN FRAMEWORK

By enacting a categorical entry ban based solely on nationality—and justifying its use as a credible proxy for "heightened risks to the security of the United States"—the President took "measures incompatible with the expressed [and] implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). The Executive Order violates both Congress's explicit directive and implied will by enacting a categorical entry ban on the basis of nationality as a substitute for individualized assessment of dangerousness.

Even if this Court decided that, rather than prohibiting the Executive Order, Congress's position is "somewhat ambiguous," *Dames & Moore*, 453 U.S. at 677, the Executive Order could not be sustained. As explained, no long-standing history suggests congressional acquiescence to the executive action at issue here; indeed Congress has plainly *disapproved* of the use of nationality as a basis for exclusion. *Cf. Dames & Moore*, 453 U.S. at 680. *See also Bank Markazi*, 136 S. Ct. at 1328 & n.28 ("Much of the [*Dames*] Court's cause for concern, however, was the risk that the ruling could be construed as license for the broad exercise of unilateral executive power."). Put differently, even if not squarely prohibited by Congress, the Executive Order is quite close, on the "spectrum running from explicit congressional

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sprung." Lyndon B. Johnson, Remarks At The Signing Of The Immigration Bill (Oct. 3, 1965).

authorization to explicit congressional prohibition," to the type of discriminatory actions Congress has rejected. *Dames & Moore*, 453 U.S. at 669.

Nor can the President rely on his exclusive constitutional powers to authorize the Executive Order. "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.*

Here, the President can make no such claim. Although some of the earlier case law characterized executive authority over immigration as capacious, *see Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (stating, in a case involving executive exercise of power expressly authorized by Congress, that power to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation"), this Court has repeatedly recognized legislative control as pivotal. *See, e.g.*, *Harisiades*, 342 U.S. at 599 (when exercising judicial review stating that "[t]he power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power 'To establish an uniform Rule of Naturalization'." (quoting U.S. Const., art. I, s. 8, cl. 4)); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (exercising judicial review while acknowledging that "[t]his Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens" (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 329 (1909)); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (exercising judicial review while noting

"that the formulation of ... policies [relating to the entry of aliens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues or our body politic as any aspect of our government"). Even assuming the President possesses some constitutionally derived authority to regulate immigration, that authority is, at best, shared with Congress. In the absence of "conclusive and preclusive" constitutional power, the President has no power to act unilaterally, in contravention of congressional intent to prohibit the use of nationality as a basis for discrimination. *Youngstown*, 343 U.S. at 638 (Jackson, J. concurring).

CONCLUSION

The President lacked statutory and constitutional authority to issue the Executive Order. The decisions of the courts below should be affirmed.

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APPENDIX

APPENDIX A

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